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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1702

MARTIN SWEIG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CRCUIT

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No.

MARTIN SWEIG,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Martin Sweig, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 14, 1971.

Opinion Below

The opinion of the court below, printed in Appendix A hereto, *infra*, p. 40, is not as yet reported.

Jurisdiction

The judgment of the court below was entered on April 14, 1971. It is printed in Appendix A hereto, *infra*, p. 53. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I. Should the indictment have been dismissed because the grand jury returned it (a) was presented with a transcript of an interview with the Speaker of the United States House of Representatives, John W. McCormack, itself not obtained in accordance with Rule 6; and (b) did not have an opportunity to observe and question the Speaker himself as a witness, especially in the light of Speaker McCormack's testimony at the trial?

II. Should the perjury count, on which petitioner was convicted, have been dismissed because Sweig's allegedly false testimony before the grand jury was the product of deliberate efforts on the part of the government to entrap him into committing perjury?

III. Is mere "commonality of proof" a sufficient connection for the joinder under Rule 8(a) of a conspiracy count with counts charging separate perjuries, where the perjuries were neither the objects of the alleged conspiracy nor the product of any joint undertaking on the part of any of the alleged co-conspirators?

IV. Is a defendant entitled to discretionary relief under Rule 14 from a proper but prejudicial joinder, where, if the court had made an *in camera* examination of hearsay declarations, as requested by petitioner, it would have noted that such hearsay declarations, even though admissible on the conspiracy count as statements made in furtherance of the conspiracy, could not possibly be admissible on the

perjury counts, and would, if admitted on the conspiracy count (as they ultimately were), be likely to be considered improperly by the jury in determining the essential element of willfulness on the perjury count?

V. May the improper admission of prior allegedly false statements offered to rebut defense evidence of petitioner's good reputation and offered as false exculpatory statements on the perjury counts for the purpose of showing willfulness, be upheld on another and possibly proper ground not raised but suggested for the first time in the appellate court?

VI. Was the evidence sufficient for a jury to find beyond a reasonable doubt that petitioner wilfully perjured himself before the grand jury?

Constitutional and Statutory Provisions Involved

There are no constitutional or statutory provisions involved in this case. However, Rules 6, 8, 14 and 30 of the *Federal Rules of Criminal Procedure* are involved. Their text is set forth in Appendix B hereto, *infra*, p. 54.

Statement of the Case

On January 12, 1970, a fifteen-count indictment was returned against petitioner Sweig, who at the time was the administrative assistant to the then Speaker of the United States House of Representatives, John W. McCormack, and one Nathan Voloshen.

Count One charged Voloshen, who lived and had an office in New York, and Sweig, who lived and worked in Washington, with conspiring to defraud the United States by using the influence of the Speaker's office to benefit Voloshen's clients who had matters pending before various federal departments and agencies by applying and attempting

to apply improper influence upon officials in those departments and agencies, in violation of 18 U.S.C. § 371. Count Two charged Voloshen alone with false personation of a federal officer in violation of 18 U.S.C. § 912. Count Three charged Sweig, aided and abetted by Voloshen, with having appeared before the S.E.C. as an agent for one of Voloshen's clients, in violation of 18 U.S.C. §§ 205 and 2. Counts Four through Twelve charged Sweig with having committed perjury before a federal grand jury on October 15, 1969, in violation of 18 U.S.C. § 1621. Counts Thirteen through Fifteen charged Voloshen with perjury in his grand jury testimony of August 5, 19, 1969.

Count Six, the only count on which petitioner was convicted, charged the false testimony (with particular answers alleged by the government to be perjurious marked in brackets) as follows:

> "Q. I take it you've made various phone calls on Mr. Voloshen's behalf to certain people, is that correct?
>
> A. Yes, sir.
>
> Q. For instance, could you give us an example of some of the pleople that you called at Mr. Voloshen's urging?
>
> A. Well, he'd come down and, say, with a service case, — a boy in the service, who applied for a Compassionate Re-assignment, or a Harship Discharge, — I have no hesitance in calling up the approp iate army officer, to find out the status of that application.
>
> Q. Can you give us one of the names?
>
> A. Oh, gee, there were so many now; I just don't remember now."
>
> * * *
>
> ("Q. Or Mr. Roth, did you ever hear that name in connection with one of these military cases?

A. No.)"

* * *

"Q. When did you do this for Mr. Voloshen?
A. Well, this is in a period of years gone by.
Q. This wouldn't be recently?
A. No, sir.
(Q. In other words, not in the last three years?
A. No, sir.)
Q. You're talking about something that happened maybe ten, fifteen years ago?
A. No, I wouldn't say ten, fifteen years ago. I can't remember that far back. I'd say in the past five years up, I may have made some calls for him in similar cases.
(Q. In other words, over five years ago?
A. Yes.)"

(R. 12-13.)

Each defendant pleaded not guilty.

Before trial, Count Two, in which Voloshen alone was named as a defendant, was dismissed for lack of venue; and Count Three, in which both were named, was dismissed for lack of venue as to Sweig and severed as to Voloshen. (R. 3.) But the trial judge denied other motions, among which were motions (1) to dismiss all the perjury counts (Counts Four through Twelve) and (2) to suppress so much of the grand jury minutes as covered petitioner's testimony because his allegedly false testimony before the grand jury was the product of "deliberate efforts (on the part of the government) to entrap (petitioner) into committing perjury" (R. 13-17); and (3) to sever the trial of the conspiracy count (Count One) "from the trial of each of the other counts and especially from the trials of Counts Four through Twelve," the perjury counts (R. 18).

During the sixteen day jury trial, which began on June 17, 1970, there was evidence of the following:

Sweig had been employed for some twenty-three or twenty-four years by Speaker McCormack, first as a clerk, then as a legislative assistant, and finally as the Speaker's top assistant. He was promoted to that post in May 1969, upon the death of Eugene Kinnaly, who had been the top assistant to the Speaker for forty years and who was alleged in the government's particulars to be a co-conspirator. (R. 2a, 170a-202a, 205a, 207a-209a.)

Kinnaly had been seriously ill for several years before his death and spent little or no time in the office. (R. 37a, 28a.) As a result, all the burdens of the Speaker's office fell on Sweig's shoulders. He worked all hours each day, 7 days a week, oftimes until one, two or three o'clock in the morning. He spoke incessantly on the telephone — taking most of the 80 to 100 telephone calls received each day; met with the 25 to 50 daily visitors, and listened to and discuss their complaints and problems; opened the mail — approximately 200 letters a day, except when a pending controversial piece of legislation excited even more mail; dictated and sometimes even typed letters and memoranda; signed correspondence; assigned work; supervised the filing by noting on the upper right-hand corner of each letter, memorandum or copy where it was to be filed, and even did some of the filing; and did any other clerical work that was required. He also met with and reported to and received instructions from the Speaker. (R. 5a-7a, 29a-30a, 31a, 129a-130a, 136a.)

One of the government witnesses, who worked in the Speaker's office, testified that Sweig was so busy that it was unlikely that he had the time to read the body of any letter. (R. 29a-30a.)

Voloshen had been a friend of Speaker McCormack long before petitioner Sweig went to work for the Speaker. (R. 31a, 171a, 186a, 203a.) He has been visiting the Speaker's District Offices at least once a week and sometimes more

often for the last 30 years or so. (R. 171a, 203a-204a.) He would remain in the Speaker's District Offices anywhere from two to four hours, usually in the Speaker's private office. While there he would pick up messages, which had been left for him, make and receive telephone calls, dictate memoranda addressed to petitioner or the Speaker and meet and confer with his clients in the Speaker's private office, sitting behind the Speaker's desk. He never asked permission. That was the situation which existed when Sweig first went to work for the Speaker and that is the situation which has continued over the years. (R. 17a-18a, 20a, 31a, 131a-133a.)

There was also evidence of the following:

In June 1968, petitioner talked on the telephone on two separate occasions with a sargeant and a colonel, who was the commanding officer of the Second Brigade, Ft. Jackson, South Carolina, about the possibility of Pvt. Gary Roth securing a hardship discharge. (R. 68a-76a, 84a-89a.)

In August 1968, petitioner talked on the telephone two different times with a major, assigned to the adjutant General Section Ft. Jackson to handle principally congressional inquiries about servicemen stationed in Ft. Jackson — about 600 a month — and learned that Roth's application for a hardship discharge had been forwarded to Selective Service in New York. (R. 104a-115a.)

In September 1968, petitioner talked on the telephone twice with the same sergeant and the new commanding officer of the Second Brigade about Roth and learned on the second occasion that Roth's application had already been approved in Ft. Jackson and had been sent to Washington, D. C. (R. 77a-83a, 89a-93a.)

That same month petitioner talked with a lieutenant colonel, assigned to the Adjutant General Corps Section in the Pentagon, about Roth. (R. 111a, 342a; Gov. Ex. 5K.)

Between June 1968, and September 1968, petitioner had

received an undated handwritten memorandum from Voloshen about Roth (R. 333a-334a; Gov. Exs. 5B and 5C); noted on a copy of a telegram dated July 26, 1968, sent in the name of the Speaker to Voloshen, that it was to be filed in "War/Roth" (R. 331a; Gov. Ex. 5); discussed the Roth case with Voloshen; noted on a piece of paper that on September 16, 1968, he had talked with Lt. Col. Selby (R. 342a; Gov. Ex. 5K); and noted on a copy of a letter to Voloshen, dated September 25, 1968, which he had dictated, that it was to be filed in "War/Roth" (R. 343a; Gov. Ex. 5L) (R. 9a-12a).

John Donato, a confessed perjurer and an accomplice of Voloshen, who had been named as a conspirator in the Government's particulars but not as a defendant and had been promised "immunity" if he would testify in this case, was called by the Government and testified on direct examination that in May 1968, he heard petitioner and Voloshen talk in the front part of Sweig's office. Voloshen had a file in his hand. He heard the name Gary Roth. They were discussing a letter that had been written by Senator Javits on behalf of Roth. Petitioner told Voloshen that it was an impossible case, that Gary Roth had no chance of getting out of the Army, and that it was cases like this which would get them into trouble. (R. 143a-144a, 164a.)

There was also evidence that in May 1969, Sweig had noted on a piece of paper that he had talked with a General Heaton about a Lt. Warner (Exhibit 6C); dictated a telegram to Voloshen advising him that Lt. Warner had been put on orders for Germany and noted on a copy of that telegram that it was to be filed in "War/Warner" (Exhibit 6); and noted on a piece of paper, "Three years in Germany w/wife". (Exhibit 6G.)

Donato further testified on direct examination that in the spring of 1969, he heard petitioner tell Voloshen that he thought that Lt. Warner, who was then on his way to Viet

Nam, was crazy for not taking a transfer to Germany even though he would have to enlist for an extra year, that Warner could enjoy Germany and tour Europe with his family, and that he was a fool if he did not accept the opportunity. (R. 146a-147a.)

On cross-examination, Donato admitted that he had lied under oath on one occasion before the Securities and Exchange Commission and on two different occasions before the grand jury returning this indictment, that it was after he had committed perjury before the S.E.C. and the grand jury that, in return for a promise of "immunity", he told about the two conversations concerning Roth and Lt. Warner, which he had said he had overheard, and that of the hundreds of conversations between Sweig and Voloshen, overheard by him, the only ones which he remembered were the conversation in May 1968 involving Gary Roth, the conversation in the spring of 1969 concerning Lt. Warner and a conversation involving a corporation named in one of the overt acts of the conspiracy count. (R. 161a-165a, 167a.)

Sweig grand jury testimony, which was read to the jury, showed that he had readily admitted that for years he had been doing Voloshen favors by trying to get him "Army and Navy tickets or something like that" and by calling up Army officers to inquire the status of hardship cases and making an appointment for him in some agency; and that he had made an appointment for him the preceding May with the Chairman of the Securities and Exchange Commission. (R. 171a-173a.)

In short, from the very beginning petitioner testified before the grand jury that he had been making calls for Mr. Voloshen and had even made call for an appointment for him a few months earlier.

Later, he was asked, "I take it you've made various phone calls on Mr. Voloshen's behalf to certain people, is that correct?" After replying in the affirmative, he was

then asked for "an example of some of the people that you called at Mr. Voloshen's urging." He answered, "Well, he'd come down and say, with a service case, — a boy in the service who applied for a Compassionate Re-assignment, or a Hardship Discharge — I have no hesitancy in calling up the appropriate Army officer, to find out the status of that application." (R. 195a-197a.)

When asked to give the names or about a specific name, petitioner responded, "Oh, gee, there were so many now; I just don't remember now ... I don't remember the name (Novick);" and also "No" or "No, sir," to the names, Roth, Mayersohn and Wittenson. (R. 197a-198a.)

There then followed a series of questions, most of which suggested and obtained, the answer sought.

Those questions and answers were as follows:

> "Q. When did you do this for Mr. Voloshen? A. Well, this is in a period of years gone by.
>
> Q. This wouldn't be recently? A. No Sir.
>
> Q. In other words, not in the last three years? A. No, Sir.
>
> Q. You're talking about something that happened maybe ten, fifteen years ago? A. No, I wouldn't say ten, fifteen years ago. I can't remember that far back. I'd say in the past five years, up, I may have made some calls for him in similar cases."
>
> Q. In other words, over five years ago? A. Yes." (R. 198a-199a.)

Upon then being questioned before the grand jury as to the procedure to be followed in aiding a servicemen to obtain a compassionate reassignment or hardship discharge, Sweig used the present tense in describing that procedure, a further indication that he meant to convey to the jurors that he was still making such calls for Voloshen.

It was on the basis of that evidence that the jury returned a guilty verdict on Count Six. There was, of course, other evidence offered in connection with the other counts, but that evidence was completely immaterial to Count Six, or, especially in the case of hearsay declarations, inadmissible on Count Six.

Except for the foregoing, which petitioner contends was insufficient, there was no evidence, direct or circumstantial, tending to show that on October 15, 1969, when he testified before the grand jury, petitioner believed that he heard the name Roth in connection with a military case or that he had made calls on military cases for Mr. Voloshen "in the last three years" or "in the past five years."

At the conclusion of the Government's main case, petitioner also moved for a judgment of acquittal on each count (R. 29, 231a) and to strike hearsay declarations, which had been admitted by the court on the theory that each had been made by a co-conspirator during the existence of the conspiracy and in furtherance of its objectives (R. 29-30, 232a). The trial judge later denied petitioner's motion to strike the hearsay declarations, allowed his motion for judgment of acquittal with respect to Counts Four and Nine, and denied it as to Counts Six, Seven, Eight, Ten, Eleven and Twelve. The Government withdrew Count Five. (R. 248a-249a.)

At the conclusion of his defense, petitioner again moved for a judgment of acquittal on each of the remaining Counts (R. 259a).

In rebuttal, evidence was admitted, over petitioner's objection, of his testimony before the Securities and Exchange Commission. That evidence was admitted on all counts to rebut evidence of petitioner's good reputation and as false exculpatory statements to show wilfulness on the perjury counts. (R. 273a-274a, 277a-283a; Gov. Ex. 45.)

Upon the conclusion of all the Government's rebuttal evidence, petitioner again moved for a judgment of acquittal on the remaining counts. (R. 285a.) His motion was ultimately denied.

On July 9, 1970, the jury returned a verdict of guilty on Count Six and verdicts of not guilty on the remaining counts.

Petitioner seasonably filed a motion for judgment of acquittal notwithstanding the verdict and, in the alternative, for a new trial; and renewed his motion to suppress petitioner's grand jury testimony. (R. 30-32, 315a.) It was stipulated in writing in connection with petitioner's motion to suppress "that at the time Martin Sweig was called to testify and did testify before the grand jury which returned the indictment in this case, the United States already had in its possession evidence from at least twenty-three other sources relating to some of the subjects on which Count One, the conspiracy count, was ultimately returned. The petitioner contends and there is basis for arguing, that these sources of evidence and the evidence itself provided sufficient basis for the return of a conspiracy indictment of the kind set forth in Count One. More specifically, the following exhibits marked for identification and delivered to the defendant Sweig at the trial pursuant to 18 U.S.C. § 3500 show evidentiary materials available to the government before October 15, 1969, and show next to each such item the overt act or acts later charged in Count One to which such materials were in some way related: (the list of exhibits then followed)* * *." (R. 32-342, 320a.) After hearing, those motions were denied (R. 4-5).

On September 3, 1970, petitioner was sentenced to be imprisoned for a period of 30 months and fined $2,000.00. Execution of sentence was stayed and petitioner was admitted to bail pending appeal. (R. 5.)

Petitioner seasonably filed notice of his appeal to the court below. (R. 5.)

The court below affirmed the judgment of the district court, holding (1) that because of the "commonality of proof, the conspiracy and perjury offenses were surely 'connected together' for purposes of Rule 8(a);" (2) that because the district court was "never asked to balance the possible prejudice resulting the admission of the tangential 'hearsay' declarations against the relevance of Sweig's participation in a conspiracy to his motive to lie before the grand jury," his claim, that the denial of his motion for discretionary severance under Rule 14 was erroneous, "in the absence of plain error . . . is not available on appeal;" (3) that "evidence of Sweig's false statement to the S.E.C. concerning Voloshen. . . was certainly relevant to the issue of wilfulness of statements to the grand jury concerning Roth and Warner;" and (4) that the evidence of wilfulness was sufficient to convict. (Appendix A hereto *infra* p. 40.)

Reasons for Granting the Writ

I. The Indictment Should Have Been Dismissed Because The Grand Jury Which Returned It (a) Was Presented With A Transcript Of An Interview With The Speaker Of The United States House Of Representatives, John W. McCormack, Itself Not Obtained In Accordance With Rule 6; And (b) Did Not Have An Opportunity To Observe And Question The Speaker Himself As A Witness, Especially In The Light Of Speaker McCormack's Testimony At The Trial.

During the course of the trial of this case, specifically on July 1, 1970, the United States Attorney's office furnished counsel for the petitioner with a document marked "GX

3585 id," a transcript of certain answers of Speaker John W. McCormack to questions placed to him under circumstances set forth in counsel's Affidavit in support of the motion, and undisputed by the Government. The circumstances were as follows: Speaker McCormack was interviewed by Assistant United States Attorneys on at least two occasions. It was not known to the petitioner until the production of Exhibit 3585 pursuant to the so-called Jencks Act, 18 U.S.C. 3500, that these interviews had been under-taken for the purpose or with the effect that transcripts of the interviews would be presented to the Grand Jury. Upon the face of the document "GX3585 id" is imprinted the designation "January 9, 1970, U. S. Grand Jury S.D.N.Y.". There also appear upon the document the appearances of three Assistant United States Attorneys, the description of John W. McCormack as "witness", and the identification of another person present during the interrogation, namely, Edward McCormack. There are further notations indicating the presence of a Grand Jury reporter for the Southern District of New York and a Notary Public for the District of Columbia.

At no time did Speaker McCormack testify before the Grand Jury in person. It is undisputed that the Grand Jury purported to instruct one of the Assistant United States Attorneys to interrogate Speaker McCormack as to the matters which are contained in Exhibit 3585. The petitioner contends that the procedure used in obtaining a transcript of questions and answers from Speaker McCormack, subsequently read to the Grand Jury, constituted two violations of Rule 6 of the Federal Rules of Criminal Procedure. The violations of Rule 6 of which the petitioner complains are the following:

A) The secrecy of proceedings before the Grand Jury as required by Rule 6 (d) and (e) was violated in the method adopted for obtaining evidence from Speaker McCormack.

Present at the question and answer interrogation were persons other than attorneys for the Government and indeed persons other than attorneys for Speaker McCormack, but rather individuals who, as a matter of law, were strangers to the proceeding and would not be persons who could legally be present under the provisions of Rule 6 (d). The rule clearly authorizes only the attorneys for the Government, the witness under examination, interpreters, and a stenographer to be present "while the Grand Jury is in session." Assuming for the moment that the method employed for obtaining a transcript by a question and answer interrogation outside of the Grand Jury room is a proper procedure, the interrogation must certainly be attended by the same restrictions as are required under Rule 6 (d) with respect to authorized persons present. In the case at bar, the existence of unauthorized persons renders the Grand Jury proceeding fatally defective and constitutes grounds upon which the Indictment should have been dismissed. See *United States* v. *Carper*, 116 F. Supp. 817 (D. C.D.C. 1953); and *United States* v. *Borys*, 169 F. Supp. 366 (D.C. Alaska 1959). The *Carper* case has fully withstood the reversal of *United States* v. *Wallace and Tiernan, Inc.*, 349 F. 2d 222 at 228 (fn. 9) (D.C. Cir. 1965) *reversing* 234 F. Supp. 786 (D.C.D.C. 1964).

B) The entire proceeding of an outside interrogation later read to the Grand Jury is a violation of the Grand Jury system as it must apply in federal cases under Rule 6.

The right of the United States to present hearsay, second-hand and otherwise remote evidence to a Grand Jury and the right of the Grand Jury to indict on the basis of such evidence should not be extended to an apparently intended avoidance of a Grand Jury proceeding as appears from the present case with respect to the testimony of Speaker McCormack. The Grand Jurors themselves should

have been allowed to see, hear and indeed question Speaker McCormack on the basis of the testimony which he gave in the question and answer interrogation. They should not simply be tantalized by a reading of his questions and answers. Had they the opportunity to observe and question, many of the matters as to which the Speaker testified in the trial of the case might well have so persuaded the Grand Jurors that they would not have returned the Indictment. Seeing and questioning the Speaker might have lead the Grand Jurors to require, as they may, additional witnesses to elucidate some of the matters particularly involving the practices of the Office of the Speaker and of Congress in general which are relevant to this case.

Moreover, the Grand Jury labored under the additional problem of a charge (Court Exhibit 5) which made no reference to its undoubted powers to summons additional evidence. While the charge might have been adequate under normal circumstances, the record in the present case — the sending of three Assistant United States Attorneys to interview the Speaker of the House of Representatives and bring back his words to a Grand Jury, uninstructed as to its powers to inquire of the Speaker directly — makes the general rule simply inapplicable. Rather than the non-appearance of the Speaker being excused as a matter of extreme inconvenience, his very status should have led the Government to *insist* on his presence or not use his evidence at all in seeking the indictment. Obviously his availability at the trial negates any suggestion that his high office was the cause of his non-appearance at the Grand Jury.

Accordingly, petitioner submits that the court below has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II. THE PERJURY COUNT, ON WHICH PETITIONER WAS CONVICTED, SHOULD HAVE BEEN DISMISSED BECAUSE SWEIG'S ALLEGEDLY FALSE TESTIMONY BEFORE THE GRAND JURY WAS THE PRODUCT OF DELIBERATE EFFORTS ON THE PART OF THE GOVERNMENT TO ENTRAP HIM INTO COMMITTING PERJURY.

The Petitioner testified before the Grand Jury on October 15, 1969. The Government entered into an extraordinary Stipulation as to the timing of the Petitioner's testimony in relation to other evidence already before the Grand Jury. The Stipulation, entitled "Stipulation Relating to Defendant's Motion for Judgment of Acquittal on Count Four [Six] or For a New Trial" states that at the time Martin Sweig was called to testify and did testify before the Grand Jury which returned the indictment in this case, the United States already had in its possession evidence from at least twenty-three other sources relating to some of the subjects on which Count One, the conspiracy count, was ultimately returned. The Stipulation further states that there is basis for arguing that these sources of evidence and the evidence themselves provided "sufficient basis for the return of a conspiracy indictment of the kind set forth in Count One." (R. 32-34.) The Stipulation further analyzes the twenty-three enumerated sources of evidence which were available to the Government *before* October 15, 1969 and relates each source of evidence to an overt act or acts later charged in Count One.

From the very questions themselves as set forth in the transcript of the Grand Jury (R. 195a-199a), the highly advanced stage of the Government's case with respect to Martin Sweig is readily apparent. The summonsing of the Petitioner to testify before the Grand Jury on October 15 could not have had as its major, or even as a

partial, purpose the obtaining of evidence of any substantive crime, or of a conspiracy related thereto, then under investigation by the Grand Jury.

Contrary to the contentions of the United States from time to time in this case, the answers which the Petitioner gave to the questions put to him on the basis of which he now stands convicted under Count Six were *not* calculated to "throw the Grand Jury investigation off the track." None of the Petitioner's answers — not those which the Government never alleged to have been false, nor those which the Government alleged were false and as to which the jury acquitted the Petitioner, nor even those contained in Count Six — had a "natural effect or tendency to influence, impede or dissuade the Grand Jury from pursuing its investigation." *U. S.* v. *Marchisio,* 344 F.2d 653, 665 (2 Cir. 1965). Such an effect or tendency was surely not possible in a Grand Jury, the prosecuting officers for which were so well informed as has been stipulated by the Government. Furthermore, in the questions which the Petitioner was convicted of falsely answering, there is contained an array of names, shot at the Petitioner, truly in Army roll-call fashion — "Novick . . . Roth . . . Mayersohn . . . Witten[illegible]on". (R. 197a-198a.) Nowhere did the attorney for the Government before the Grand Jury offer a hint or a suggestion which might have been the basis for refreshing the Petitioner's recollection. The procedure was totally contrary to that used in *United States* v. *Owen,* 11 F.R.D. 371 (D.C. Mo., 1951), and most recently noted with implicit approval in *United States* v. *Stone,* 429 F.2d 138 (2d Cir. 1970).

The Petitioner further relies in this argument upon two significant opinions, one by a court of appeals and another by a district court, which consider the standard to which, in the interest of justice, the United States must be held with respect to its use of the Grand Jury or other official

body to produce a perjury record. In *Brown* v. *United States,* 245 F.2d 549 (8th Cir. 1957), the appellant was convicted of perjury before a Grand Jury sitting in the United States District Court in Nebraska. The stated purpose of the Grand Jury inquiry was to determine whether the defendant, an employee of the Internal Revenue Service, and others had, in conspiracy or otherwise, obstructed or attempted to obstruct an Internal Revenue investigation. Prior to his testifying, the Government had undertaken an extensive investigation of alleged corruption in the St. Louis, Missouri, Internal Revenue Office, and the defendant had been one of the assigned investigators. The Grand Jury had been sitting for approximately eleven months when the defendant was summonsed to Nebraska to testify. As in the present case, he was interviewed by representatives of the United States with respect to the activities for the prior four years. Questions which were later the basis for a perjury indictment were then asked him before the Grand Jury. Appealing his conviction for perjury, the defendant claimed, among other things, that the Grand Jury was without jurisdiction inasmuch as nothing of substance relating to the subject matter occurred in the District of Nebraska. Although it is clear that evidence of a conspiracy could have granted venue for the Grand Jury, the court in an alternative holding, agreed with this contention. The court proceeded, however, to address itself to a more fundamental question on which the Petitioner in the case at bar relies. In this second alternative holding, the court considered the question of whether the Federal Grand Jury had acted improperly in summonsing the defendant apparently "for the purpose of extracting testimony from him, with a view to prosecuting him for perjury and without any purpose of obtaining from him any evidence, upon which, in whole or in part, it could find a true bill against anyone for any offense committed, in

whole or in part, in Nebraska." The court sustained the defendant's argument, that this conduct was an abuse of the powers of a Grand Jury, stating as follows:

> "The court is of the opinion that the evidence in this case clearly established that [the Government's] purpose was simply to do what [it] did, viz., to extract from the defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1950, knowing that his recollection of it differed from that of others present, and to get him indicted for perjury. [The Government] knew how each of the parties to that talk, including the defendant, remembered it because each had made his sworn statement to [an] investigator and three of the parties to the talk had already given their recollection of it to the grand jury before [the Government] called the defendant. Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt." *Brown* v. *United States*, 245 F. 2d at 555.

In the case at bar, the only distinction is that the Grand Jury undoubtedly had jurisdiction over the possible substantive crimes, whereas the *Brown* first alternative holding questioned venue. It is interesting to note that the decison in *Brown*, as it relates to the abuse of the Grand Jury process, was acknowledged by Judge Weinfeld in *U. S.* v. *Winter*, 348 F. 2d 204 (2d Cir. 1965) as an alternative holding involving "deliberate efforts to entrap witnesses into committing perjury." 348 F. 2d at 210 (fn. 19). Similar reasoning is found in *United States* v. *Cross*, 170 F.Supp. 303, 310 (D.C. D.C. 1959), with the particular facts

involving allegedly perjurious testimony before a Congressional Investigating Committee. See also *United States* v. *Icardi,* 140 F. Supp. 383 (D.C. D.C. 1956). In Congressional Investigating Committee cases, to be sure, the question is whether the facts sought to be elicited were in aid of valid legislative purposes. A similar analysis is available upon the facts of the present case, however, with respect to a valid purpose by those in charge of the Grand Jury to elicit evidence for substantive crime as distinguished from making a record for a perjury indictment.

Perhaps the closest factual situation which can be brought to the Court's attention is in *United States* v. *Thayer,* 214 F. Supp. 929 (D. C. Col. 1963). In that case the defendant was indicted for perjury before the United States Securites and Exchange Commission. After the jury reurned guilty verdicts, and upon a motion for a new trial, the court considered whether the testimony beore the Securities and Exchange Commission had been obtained in violation of the constitutional rights of the defendant. After consideration of questions with respect to the defendant's privilege against self-incrimination, the court concluded that there was no evidence of such violation. It then went further: "The issue is also whether the methods employed in obtaining and inducing his testimony show unfairness which, quite apart from the prohibitions of the Fifth Amendment, render the evidence so obtained inadmissible." 214 F. Supp. at 930. The court examined the testimony which had been produced at the trial to determine the extent to which the official conducting the SEC investigation had anticipated a perjury prosecution. Conclusions of the court are apt in relation to the Petitioner's argument in the present case:

> "From the record which is before the court, there are indications that the Securities and Exchange Commis-

> sion was at least thinking about, if not considering, a prosecution for perjury prior to the April nineteenth interrogation. It cannot be concluded, however, that the defendant was called in with the view to obtaining unequivocal and clear cut testimony which would be suitable for an indictment." 214 F.Supp. at 931-932.

Noting that other evidence should be examined at a further proceeding, the court continued:

> "If it should appear that the Government was substantially certain prior to the April nineteenth hearing that the defendant would give false answers, it would then follow that the testimony so induced should not be received in evidence." 214 F.Supp. at 932.

Conclusions of the *Thayer* court are applicable in the present case:

> "In the case at bar it cannot now be found and concluded that the testimony which formed the basis for the present indictment was illegally obtained and that it is therefore inadmissible in evidence and that the indictment upon which the testimony is based should be quashed. *It can, however, be concluded that the circumstances are such as to require careful investigation of the circumstances surrounding the taking of the testimony which led to this indictment with a view to determining whether the circumstances comport to the standards of fairness which are referred to by the Supreme Court in the McNabb case. Circumstances of instigation or of entrapment, or circumstances showing disparity of knowledge as between the Government and the accused whereby he lacked realization of the true import of the inquiry, would necessarily require exclusion of the evidence.* While the proceedings before the Securities and Exchange Commission are not now

being condemned, at the same time hazard of fairness being recognized, and where even such a hazard exists, the conviction cannot be approved." 214 F. Supp. at 933. (Emphasis supplied.)

It is not without significance that the reasoning in *Thayer* has been called by Judge Bartels in *United States* v. *Andreadis* 234 F. Supp. 341 (D.C.E.D.N.Y. 1964) "an implementation of the instructions of Mr. Justice Frankfurter" in *McNabb* v. *United States*. Most significantly, in *United States* v. *Corallo*, 413 F.2d 1306 (2nd Cir. 1969), at p. 1328 the court implied that there might exist circumstances for curtailing the investigatory powers of the Grand Jury. Those circumstances exist, in the words of McNabb, if "a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted" upon the circumstances as candidly set forth through the Government's Stipulation. Finally, the notion of special circumstances as constituting the basis for impropriety in criminal prosecusions, with specific citation of the *Thayer case* is found recently in the decision of the United States Supreme Court in *United States* v. *Kordel*, 397 U.S. 1, 12, 90 S. Ct. 763, 770 (1970).

III. Mere "Commonality Of Proof" Is Not A Sufficient Connection For The Joinder Under Rule 8(a) Of A Conspiracy Count With Counts Charging Separate Perjuries, Where The Perjuries Were Neither The Objects Of The Alleged Conspiracy Nor The Product Of Any Joint Undertaking On The Part Of Any Of The Alleged Co-conspirators.

The court below misconstrued Rule 8(a) of the *Federal Rules of Criminal Procedure*. While that rule "permits the joinder of two or more offenses against a single defendant if the offenses 'are based on . . . two or more actions or

transactions connected together,' " the requirement is not satisfied merely because some elements of proof are common to all. Compare Rule 8(b), which permits the joinder of defendants, if they are alleged to have "participated", a word which has an entirely different meaning than the word "based", appearing in Rule 8(a). Obviously, proof of statements alleged to constitute the perjury in a perjury count, even though also admissible on a conspiracy count as false exculpatory statements, cannot possibly be construed as the base or foundation of the conspiracy. So. too, proof of an overt act set forth in the conspiracy count, even though also admissible to prove the falsity of the statements alleged in a perjury count to be perjurious, cannot possibly be said to be the foundation of the perjury. In short, if it had been intended that common evidence was sufficient to satisfy that portion of Rule 8(a) it would have been a simple matter for the rule to have so provided.

Petitioner believes that the court below misconstrued the meaning of the pertinent portion of Rule 8(a).

IV. A Defendant Is Entitled to Discretionary Relief Under Rule 14 From a Proper But Prejudicial Joinder, Where, if the Court Had Made an *In Camera* Examination of Hearsay Declarations, as Requested by Petitioner, It Would Have Noted That Such Hearsay Declaration, Even Though Admissible on the Conspiracy Count as Statements Made in Furtherance of the Conspiracy, Could Not Possibly Be Admissible on the Perjury Counts, and Would, if Admitted on the Conspiracy Count (as They Ultimately Were) Be Likely To Be Considered Improperly by the Jury in Determining the Essential Element of Willfulness on the Perjury Count.

In any case, petitioner believes that he was entitled to a severance as a matter of discretion under Rule 14.

In concluding that petitioner's appeal to discretion under Rule 14 was insufficient, the trial judge overlooked the effect upon the perjury counts of the admission into evidence of highly prejudicial hearsay declarations made by Voloshen and other co-conspirators purportedly during the existence of the conspiracy and in furtherance of its objectives. Under no possible circumstances could such hearsay declarations be admissible on the perjury counts. Had the trial judge examined those declarations *in camera*, as permitted by Rule 14 and requested by petitioner (R. 18), he would readily have noticed the prejudice. But he did not. Nor did he consider the possibility of a dismissal of the conspiracy count before the submission of the case to the jury or of a not guilty verdict after submission to the jury. Cf. *Schaffer* v. *United States*, 362 U.S. 511, 514-518, 80 S. Ct. 945, 947-949; *United States* v. *Catino*, 403 F.2d 491, 495 (2 Cir. 1968); and *United States* v. *Granello*, 365 F.2d 990, 993-995 (2 Cir. 1966).

At any rate, during the trial, many such hearsay declarations were introduced into evidence. They disclosed, among other things, that in petitioner's absence, Voloshen had solicited and received $141,500.00 mostly in currency, in sums ranging from as little as $1,500.00 to as much as $50,000.00, for promising to obtain a state defendant a suspended sentence (R. 40a-43a); a soldier a hardship discharge (R. 47a-48a); an income tax evader probation (R. 97a-98a; 103a); one federal prisoner kept in a desired institution (R. 117a-118a) and a state prisoner an early parole (R. 148a-151a); one corporation help in registering its stock with the S.E.C. (R. 120a-121a, 125a, 151a-153a); and another corporation, threatened with an S.E.C. suspension, an appointment with the Chairman of the Commission (R. 122a, 155a).

There were even more prejudicial hearsay declarations admitted into evidence. Roth's father-in-law testified that he told Voloshen that Roth had been reclassified as "a 1-A delinquent" by his local draftboard because he had falsely claimed that he was a member of a military reserve unit, that he asked Voloshen's help in preventing Roth's induction, and that upon obtaining Voloshen's promise of help, paid him $1,500.00 in currency. (R. 44a-50a.) Roth testified that he, too, told Voloshen that he had been reclassified because a fraudulent document indicating that he was a member of a military reserve unit had been uncovered in his selective service file. (R. 52a-55a.) Roth's father testified that after Roth's induction, he delivered certain documents to Voloshen, who then caused a covering letter to be typed on the father's personal stationery informing the camp commander at Ft. Jackson, South Carolina, that his "very dear and good friend, Speaker John W. McCormack," had advised him that his office had discussed with the camp commander the matter of his son, and that when the father pointed out to Voloshen that he did not even know the Speaker, Voloshen assured him it was all right to sign the letter. (R. 65a-67a.)

None of those hearsay declarations would have been admissible in a separate trial of the perjury counts. Not even the evidence of Voloshen's conversations with Roth's father-in-law, Roth and Roth's father, which the prosecutor so effectively used in his closing summation to the jury (Tr. 2259-2265) and in his brief in the court below as a springboard for the argument that the adverse information which Voloshen learned during the conversations was "presumably related" by Voloshen to Sweig and that Sweig, therefore, lied when he told the camp commander at Ft. Jackson that he did not think that Roth should be in the army, that Roth had been reclassified a 1-A delinquent

because of a technicality and that Roth's father and the Speaker were personal friends.

To aggravate the prejudice resulting from the joinder, the district court never instructed the jury that before those hearsay declarations could be considered under Count One, they would first have to find that Sweig was a member of the conspiracy from his own acts and declarations. More importantly, the district court never told them that even if they found that Sweig was a member of the conspiracy, those hearsay declarations could not be considered in determining Sweig's guilt or innocence on the perjury counts. Compare, e.g., *Schaffer* v. *United States*, 362 U.S. 511, 515, 80 S. Ct. 945, 948; *Opper* v. *United States*, 349 U.S. 84, 95, 75 S. Ct. 158, 165; *United States* v. *Coralo*, 413 F.2d 1306, 1327 (2 Cir. 1969); *United States* v. *Catino*, 403 F.2d 491, 495 (2 Cir. 1968); *United States* v. *Granello*, 365 F.2d 990, 995 (2 Cir. 1966); and *United States* v. *Kaufman*, 311 F.2d 695, 698 (2 Cir. 1963).

To further compound the prejudice, the trial judge actually charged the jury that in determining whether Sweig's grand jury testimony was wilfully false, it was their "task to draw suitable inferences" from "all the facts in the case" (R. 311a.) That instruction actually invited the jury to consider all of those hearsay declarations.

It seems to petitioner that the clear guilt of Voloshen must have improperly spilled over and prejudiced him, even though the asserted bond between petitioner and Voloshen was apparently insufficient to convince the jury of petitioner's membership in the conspiracy. What Mr. Justice Douglas said in dissent, with Chief Justice Warren and Justices Black and Brennan concurring, in *Schaffer* v. *United States*, 362 U.S. 511, 523-524, 80 S. Ct. 945, 952, seems particularly apt. After noting that the danger of prejudice is greater in a trial like the instant case, where a not guilty verdict is returned on the conspiracy count

and a guilty verdict on the other count, than in a case where the conspiracy count is dismissed before the substantive counts are submitted to the jury, Mr. Justice Douglas said:

> "... Once the conspiracy is supported by evidence, it presents issues for the jury to decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known.
>
> "Conspiracy presents perplexing problems that have long concerned courts. ... While it is proper at times to join a conspiracy count with substantive counts even where the latter are the same as the overt acts charged in the conspiracy count ... there is danger in any multiplication. The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized. We allow conspiracy to be put to new dangerous uses when we sanction the practice approved here."

Petitioner believes that he was entitled to a trial on the perjury counts free of prejudice from evidence admissible only on the conspiracy count, and that his interest in such a trial is paramount to whatever interest the public has in avoiding duplicitous, time-consuming and expensive trials. As indicated, the court below emphasized:

> "Despite this expression of the court's willingness to reconsider the question of severance, the defense never raised the issue again. Judge Frankel was therefore never asked to balance the possible prejudice resulting from the admission of the tangenital 'hearsay' declarations against the relevance of Sweig's participation in a conspiracy to his motive to lie before the grand

> jury. Hence, in the absence of plain error this claim is not available on appeal.... In the circumstances of this case, we cannot say that denial of the severance motion constituted plain error." (Appendix A hereto, *infra*, p. 40.)

But it seems to petitioner that having seasonably raised the issue and requested the trial judge to examine those declarations *in camera* (R. 18), as permitted under Rule 14, petitioner did all that could be expected of him. Had the trial judge examined all those declarations *in camera*, he would readily have noticed the prejudice. The trial judge should not be shielded by Rule 30, Fed. R. Crim. P.

V. The Improper Admission of Prior Allegedly False Statements Offered To Rebut Defense Evidence of Petitioner's Good Reputation and Offered as False Exculpatory Statements on the Perjury Counts For the Purpose of Showing Willfulness, Should Not Be Upheld on Another and Possibly Proper Ground Not Raised But Suggested For the First Time in the Appellate Court.

At the conclusion of the Government's case, petitioner offered evidence of the excellence of his reputation for truth, honesty and veracity, as well as some other evidence having no bearing on any of the issues raised here. In rebuttal, the Government sought to offer in evidence excerpts of Sweig's sworn testimony before the Securities and Exchange Commission to the effect that Voloshen had never dictated to the Speaker's staff and had never used the Speaker's private office. Such evidence was offered, in the words of the prosecutor, "as rebuttal material, again on the character testimony about truth and veracity"—to

rebut "his good character in the light of the standards he set for himself" (R. 266a), to go "in on all the counts, ... on the conspiracy count and as false exculpatory statements on the perjury counts to show wilfulness" (R. 273a-274a.)

When questioned by the trial judge, following the petitioner's objection to the reopening of the case, as to why that evidence had not been offered as part of the Government's case in chief, the prosecutor admitted quite frankly that upon the basis of statements made by Sweig's lawyer, that Sweig would take the witness stand in his own defense, he had intended to use the S.E.C. testimony in the cross-examination of Sweig. (R. 265a.)

The trial judge apparently thought that was good enough reason for, despite the petitioner's objection, he then admitted into evidence that portion of Sweig's sworn testimony before the S.E.C. (R. 280a-283a.)

The trial judge also denied petitioner's motion to strike, made immediately after the reading of that testimony to the jury (R. 283a.)

In his main summation to the jury, the United States Attorney emphasized that petitioner's false S.E.C. testimony rebutted the "character witnesses who testified here to the defendant's reputation for truth and veracity" and was "helpful ... in assessing the wilfulness of the defendant" on the perjury counts. (R. 288a-290a.)

Petitioner believes that the S.E.C. testimony was clearly inadmissible.

First of all, evidence that petitioner had testified falsely before the Securities and Exchange Commission was not admissible to rebut petitioner's evidence of his good reputation for honesty, truth and veracity. The prosecutor may only rebut such evidence either by calling a witness who will testify that petitioner's reputation is bad, *United*

States v. *Beno*, 324 F.2d 582, 587 (2 Cir. 1963); 1 Wigmore, *Evidence* (3d Ed.), s. 193, p. 643; Wright, *Federal Practice and Procedure*, s. 409, pp. 119-120; Orfield, *Criminal Procedure Under the Federal Rules*, s. 26: 463, pp. 804-805; McCormick, *Evidence* (1954 Ed.), s. 158, p. 337; or possibly, "under the guise of testing the extent of the knowledge the witness has of the defendant's reputation," by asking "the witness if he had heard unsavory things about the defendant." Wright, Id., s. 409, p. 120; *United States* v. *Beno*, 324 F.2d at 588; *United States* v. *Giddins*, 273 F.2d 843, 845 (2 Cir. 1960), *cert. den.* 362 U.S. 971, 80 S. Ct. 955; cf. *Michelson* v. *United States*, 335 U.S. 469, 475-484, 69 S. Ct. 213, 218-223. As a result, the transcript of petitioner's S.E.C. testimony was not admissible to rebut evidence of petitioner's good reputation.

In the second place, petitioner's testimony before the Securities and Exchange Commission, even if intentionally false and admissible on the conspiracy count, cf. *United States* v. *Smolin*, 182 F.2d 782, 786 (2 Cir. 1950); *United States* v. *Simone*, 205 F.2d 480, 482-483 (2 Cir. 1953); *United States* v. *Ford*, 237 F.2d 57, 63 (fn. 10) (2 Cir. 1956), was erroneously admitted as false exculpatory statements tending to show consciousness of his guilt on the perjury counts and especially on the perjury count on which he stands convicted. The statements were not "false statement(s) about the matter in litigation" under that count, that is, whether petitioner had heard the name Roth in connection with a military case or had made calls on military cases for Voloshen "in the last three years" or "in the past five years." Evidence that petitioner had lied in an entirely different proceeding about Voloshen's use of the Speaker's secretarial staff and private office did not constitute "false statements in explanation or defense" of the crime alleged in Count Six. Cf. *Wilson* v. *United States*, 162 U.S. 613, 621, 16 S. Ct. 895, 899. As a result, petitioner

believes that the admission in evidence of the S.E.C. transcript as false exculpatory statements, even if offered for that limited purpose and admissible at all, should have been limited to the conspiracy count; and that its admission on all counts, including the perjury counts, was also erroneous.

Moreover, the transcript was not offered for the single purpose of showing that petitioner had made false exculpatory statements. As already shown, it was offered for the additional purpose of rebutting petitioner's reputation evidence. And where evidence is offered for two purposes, one of which is wrong, its admission constitutes clear error even though it would have been admissible if offered solely for the other purpose. 1 Wigmore, *Evidence* (3d Ed.), s. 17, p. 320.

In the third place, the Government cannot now justify the admission of the S.E.C. transcript on the ground that it was evidence of other crimes. It was not offered for that purpose; and the cases hold that the Government will not be permitted to secure the admission of evidence of other crimes for the purpose of rebutting a defendant's reputation evidence and as false exculpatory statements, when, as shown, the evidence was not admissible for those purposes, and then attempt to support its admission on another and possibly proper ground, suggested for the first time in the appellate court. "A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected.... Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed." *Shepard* v. *United States,* 290 U.S. 96, 103, 54 S. Ct. 22, 25; *United States* v. *Klass,* 166 F.2d 373, (3 Cir. 1948); *Martin* v. *United States,* 127 F.2d 865, 866 (D.C. Cir. 1942); *State* v. *Goebel,* 36 Wash. 2d 367, 375-

379, 218 P.2d 300, 306 (1950); *People* v. *Zackowitz,* 254 N.Y. 192, 172 N.E. 466, 467 (1930); 1 Wigmore, *Evidence* (3d Ed.) s. 17, p. 320.

Finally, petitioner believes that even if the prosecutor had offered the S.E.C. transcript as evidence of still another crime, a balancing of all of the relevant factors would have required a determination that its prejudicial character outweighed its probative value and, therefore, required its exclusion. Cf. *United States* v. *Deaton,* 381 F.2d 114, 117 (2 Cir. 1967). Here, petitioner was on trial for a rather "elastic, sprawling and pervasive" conspiracy, as well as for at least nine allegedly different perjuries. To describe the seat, which he occupied, as "uneasy" is to put it mildly. He was, as already indicated, repeatedly faced with a variety of statements attributed to Voloshen and others, which the prosecutor offered to persuade the jury of the existence of the conspiracy itself. Sweig's principal concern and efforts of necessity had to be directed to containing that tenuous charge. To permit the prosecutor in those circumstances to offer evidence of still another alleged perjury was, petitioner believes, highly prejudicial, especially because of the trial judge's failure to instruct the jury on the restricted use, if any, to which they could put the S.E.C. transcript. Cf. *United States* v. *Beno,* 324 F.2d 582, 589 (2 Cir. 1963).

VI. The Evidence Was Not Sufficient For a Jury To Find Beyond a Reasonable Doubt That Petitioner Wilfully Perjured Himself Before the Grand Jury.

Petitioner believes that the denial of his motions for judgment of acquittal constituted error.

Firstly, the evidence of petitioner's belief in the falsity of his testimony, that he had not heard the name Roth, was insufficient to sustain his conviction.

Admittedly, there was ample evidence that petitioner had made and received telephone calls concerning Roth and performed other routine acts in his behalf or in connection with his case at various times during the period between May 1, 1968, and September 30, 1968; and if he had testified before the grand jury during that period, that he had not heard of that name, there may have been a basis for an inference that he did not then believe his testimony. Even then there may have been a reasonable doubt, since what petitioner did in behalf of Roth was of such a highly routine nature that it was not likely to be remembered.

But petitioner did not testify during or shortly after that period, cf. *Berhle* v. *United States,* 100 F.2d 714, 716 (D. C. Cir. 1938); *United States* v. *Magin,* 280 F.2d 74, 78 (7 Cir. 1960); *La Placa* v. *United States,* 354 F.2d at 59; he testified before the grand jury on October 15, 1969, at least 12 1/2 months later — after literally countless, faceless names had been the subjects of his telephone calls, correspondence and memoranda. Nor was he questioned about a matter, relationship or name which, because of its unusual nature, or long lasting, close relationship, or uniqueness, one might expect him to remember, cf. *Berhle* v. *United States,* 100 F.2d at 716; *Young* v. *United States,* 212 F.2d 236, 240 (D. C. Cir. 1954); *United States* v. *Magin,* 280 F.2d at 78; *United States* v. *Nicoletti,* 310 F.2d 359, 363-364 (7 Cir. 1962); *La Placa* v. *United States,* 354 F.2d at 59. He was questioned on October 15, 1969, about a name which, even during the summer of 1968, was in the words of *Young* v. *United States,* 212 F.2d 236, 241 (D. C. Cir. 1954), a mere "triviality" to him — concerning a name which had undoubtedly long since been forgotten by him.

Cases like *La Placa* v. *United States,* 354 F.2d 56, 59 (1 Cir. 1965); *United States* v. *Nicoletti,* 310 F.2d 359, 364 (7 Cir. 1962); *United States* v. *Beach,* 296 F.2d 153 (4 Cir. 1961); *United States* v. *Magin,* 280 F.2d 74, 78 (7 Cir. 1960); *Young* v. *United States,* 212 F.2d 236, 240 (D. C. Cir. 1954); and *Berhle* v. *United States,* 100 F.2d 714 716 (D. C. Cir. 1938), holding that the petitioner's belief of the falsity of his testimony may be inferred from evidence of the falsity are readily distinguishable. Each involved testimony concerning an unusual occurrence or a long, close relationship. Some involved testimony about more recent events. In three cases, *La Placa, Magin* and *Berhle,* there was also evidence of defendant's admission indicating that he knew that his testimony was false. *La Placa,* for example, had testified about events "two months past," which, he said, "he remembered 'very well'," and, because of their extra-ordinary nature, "made a very considerable impression" upon him. Petitioner, on the other hand, was testifying about a name which may possibly have had some significance to him 12 1/2 months earlier but not at the time of his testimony, never professed to have remembered Roth's name, and had so many calls for assistance in military cases that he was unable to remember any specific name. (R. 197a-198a.)

Besides, Sweig's negative answer to the question, "did you ever hear that name (Roth) in connection with one of these military cases?", cannot be considered in isolation. Its clear significance, when considered in the context of his four immediately preceding answers, is that there were so many calls of that kind, he was unable to remember the name of any, including the name of Roth. In this connection, it should be noted that the Government never contended that any of petitioner's answers to the other questions about Novick, Mayersohn or Wittenson was false.

In the case at bar, there were no "overt acts" furnishing "a rational basis for inferring what the accused thought (about his testimony that he had not heard of Roth). . . and which were supported as the rule requires. . . ." *United States* v. *Remington,* 191 F.2d 246, 249 (2 Cir. 1951). Moreover, as already demonstrated, belief of falsity could not be inferred from mere proof of the falsity itself. In short, there was nothing which the defendant said or did in the summer of 1968, which could give rise to an inference that on October 15, 1969, he remembered the name "Roth." In any case, the circumstantial evidence necessary to prove the intent to falsify was far from "strong and convincing."

Furthermore, the alleged false testimony, that he had not heard of the name "Roth", had no "natural effect on tendency to influence, impede or dissuade the grand jury from pursuing its investigation. . . ." *United States* v. *Marchisio,* 344 F.2d 653, 665 (2 Cir. 1965).

For the foregoing reasons, defendant believes that the evidence was insufficient to sustain a perjury conviction based on his grand jury testimony that he had not heard the name Roth.

Secondly, the evidence of defendant's belief in the falsity of his testimony, that he had not made calls for Voloshen in the last five years was equally insufficient to sustain a conviction for the very reasons already argued.

Moreover, the clear significance of the defendant's testimony, considered as a whole, is that he made numerous calls for Voloshen within the past years.

Defendant readily testified before the grand jury that for the last thirty years or so, Voloshen had visited the Speaker's District Office "sometimes once a week, sometimes twice;" that he had done him favors by trying to get him "Army and Navy tickets or something like that"

and by calling up and making an appointment for him in some agency; and that he had made an appointment for him a few months before with the Chairman of the Securities & Exchange Commission. (R. 171a-173a.)

In short, from the very beginning defendant testified that he had made calls for Voloshen and had even made a call for an appointment for him in the preceding May.

Later on, he was asked whether he had made any other (calls for) appointments for Mr. Voloshen in other agencies and whether he had made any such (calls for) appointments during the last nine months; and on each occasion, he replied that he could not or did not remember. Then he was asked about the first five months of 1969 and also about 1968. He answered, "I'd be inclined to say no." to the question relating to the first five months of 1969; and that he could not or did not remember, to the question about 1968. (R. 195a-196a.)

Still later, he was asked, "I take it you've made various phone calls on Mr. Voloshen's behalf to certain people, is that correct?" After replying in the affirmative, he was then asked for "an example of some of the people that you called at Mr. Voloshen's urging." He answered, "Well, he'd come down and, say, with a service case, — a boy in the service who applied for a Compassionate Re-assignment, or a Hardship Discharge — I have no hesitancy in calling up the appropriate Army officer, to find out the status of that application." (R. 197a.)

From the use of the present tense, it is obvious that defendant was indicating that he was still making phone calls on Voloshen's behalf.

When asked to give the names or about a specific name, defendant responded, "Oh gee, there were so many now; I just don't remember now. . . . I don't remember the name (Novick);" and also "No" or "No, sir," to the names, Roth, Mayersohn, and Wittenson. (R. 197a-198a.)

There then followed a series of questions, most of which suggested, and obtained, the answer sought.

Those questions and answers were as follows:

> "Q. When did you do this for Mr. Voloshen? A. Well, this is in a period of years gone by.
>
> Q. This wouldn't be recently? A. No sir.
>
> Q. In other words, not in the last three years? A. No, sir.
>
> Q. You're talking about something that happened maybe ten, fifteen years ago? A. No, I wouldn't say ten, fifteen years ago. I can't remember that far back. I'd say in the past five years, *up,* I may have made some calls for him in similar cases." (R. 198a.) (Italics supplied.)

The question, "In other words, not in the last three years," was itself ambiguous and susceptible of various interpretations. Moreover, the answer was also susceptible of several meanings, or capable of a subjective meaning quite different from what the prosecutor might have had in mind. In addition, it seems clear that by the words "five years, up," defendant meant within the past five years, especially when it is remembered that it was during those years that Mr. Kinally's health became increasingly bad and defendant consequently had to assume more and more of the responsibilities of the Administrative Assistant. It seems equally clear that by that answer defendant intended to correct his prior answer, which had been unfairly suggested by the question. "In other words not in the last three years." Unfortunately for defendant, after indicating that he had made such calls for Mr. Voloshen within the past five years, he was unfairly led, and he succumbed, once more into answering affirmatively the question, "In other words, over five years ago." (R. 198a.)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 694—September Term, 1970.
(Argued March 26, 1971 Decided April 14, 1971.)
Docket No. 35503

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN SWEIG,

Defendant-Appellant,

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and HAYS, *Circuit Judges.*

Appeal from a judgment of conviction on one count of perjury, in the District Court for the Southern District of New York, Marvin E. Frankel, *J.*, after trial by jury. Affirmed.

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, *for appellee.*

MANUEL KATZ, Boston, Massachusetts (Paul T. Smith and Morris M. Goldings, on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

Martin Sweig appeals from a judgment of conviction on one count of perjury, entered on September 3, 1970, in

the Southern District of New York, after a sixteen-day jury trial before Judge Frankel. On the same day, Sweig was sentenced to a term of thirty months in jail and was fined $2,000; execution of his sentence was stayed and he is presently enlarged on bail pending appeal. We affirm the conviction.

The fifteen-count indictment in this case charged Sweig and Nathan Voloshen with conspiracy and related offenses of false personation, conflict of interest, and perjury. Count One alleged that Voloshen, who lived and had an office in New York City, and Sweig, who had been an administrative assistant to Speaker of the United States House of Representatives John W. McCormack for 23 or 24 years, conspired to defraud the United States by using the influence of the Speaker's office to benefit Voloshen's clients who had matters pending before various federal departments and agencies by applying and attempting to apply improper influence upon officials in said departments and agencies, in violation of 18 U.S.C. §371. Count Two charged Voloshen alone with false personation of a federal officer in violation of Title 18 U.S.C. §912. Count Three charged Sweig and Voloshen with conflict of interest in violation of 18 U.S.C. §§205 and 2. Counts Four through Twelve charged Sweig with perjury in his grand jury testimony of October 15, 1969, in violation of 18 U.S.C. §1621. Counts Thirteen through Fifteen charged Voloshen with perjury in his grand jury testimony of August 5 and 19, 1969.

Voloshen pleaded guilty before trial to Counts One, Thirteen, Fourteen and Fifteen. As for Sweig, Count Three was dismissed prior to trial for lack of venue, Counts Four and Nine were dismissed by the court at the close of the government's case, and Count Five was withdrawn by the government at the same time. On July 7, 1970, the jury acquitted Sweig on Counts One, Seven,

Eight, Ten, Eleven, and Twelve, and found him guilty on Count Six, one of the perjury counts.

With respect to Count Six, the only count on which Sweig was convicted, the government's proof at trial showed that Sweig made numerous telephone calls to military personnel in 1968 and 1969 on behalf of Gary Roth and Roger Warner, two of Voloshen's clients; that these telephone calls were made in Sweig's official capacity as assistant to the Speaker in order to help secure benefits for those clients, such as discharge from the Army or a better assignment within the Army; and that on October 15, 1969, in sworn testimony before a federal grand jury sitting in the Southern District of New York, Sweig falsely denied even hearing of Roth and falsely stated that he had not made telephone calls relating to servicemen for Voloshen for three years or five years preceding the date of his appearance before the grand jury. Specifically, Sweig's allegedly false testimony was as follows (with the particular answers charged by the government as perjurious marked in brackets):

> Q. I take it you've made various phone calls on Mr. Voloshen's behalf to certain people, is that correct? A. Yes, sir.
>
> Q. For instance, could you give us an example of some of the people that you called at Mr. Voloshen's urging? A. Well, he'd come down and, say, with a service case,—a boy in the service, who applied for a Compassionate Re-assignment, or a Hardship Discharge,—I have no hesitancy in calling up the appropriate army officer, to find out the status of that application.
>
> Q. Can you give us one of the names? A. Oh, gee, there were so many now; I just don't remember now.
>
> * * * * *

[Q. Or Mr. Roth, did you ever hear that name in connection with one of these military cases? A. No.]

* * * * *

Q. When did you do this for Mr. Voloshen? A. Well, this is in a period of years gone by.

Q. This wouldn't be recently? A. No, sir.

[Q. In other words, not in the last three years? A. No sir.]

Q. You're talking about something that happened maybe ten, fifteen years ago? A. No, I wouldn't say ten, fifteen years ago. I can't remember that far back. I'd say in the past five years, up, I may have made some calls for him in similar cases.

[Q. In other words, over five years ago? A. Yes.]

Sweig's major contention on appeal is that the district court erred in denying his motion for acquittal on the perjury counts, because there was insufficient evidence that, when he made his concededly false statements, he subjectively *knew* that those statements were false. The accused's knowledge of the falsity of his statements at the time he made those statements is essential to a perjury conviction under 18 U.S.C. §1621. *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970); *LaPlaca* v. *United States*, 354 F.2d 56, 58 (1st Cir. 1965), cert. denied, 383 U.S. 927 (1966); *United States* v. *Magin*, 280 F.2d 74, 76 (7th Cir.), cert. denied, 364 U.S. 914 (1960).

Sweig argues that this essential element of knowledge or wilfulness was not proven here. First, he claims, the evidence was insufficient for a jury to find beyond a reasonable doubt that he wilfully perjured himself when he stated that he had never heard of Roth. Rather, according to Sweig, the fact that he dealt with so many names and people in his capacity as administrative assistant to the Speaker and the fact that Roth was involved in what he calls a routine matter preclude a jury's conclusive finding

that his statement was wilful or attributable to something other than innocent forgetfulness. Second, Sweig contends, the evidence that he intentionally lied when he testified that he had not made calls for Voloshen in the last three or five years was insufficient, because such calls were routine matters which he had no reason to remember. Moreover, according to Sweig, the clear significance of his grand jury testimony, considered as a whole, is that he *did* make numerous calls for Voloshen within the past five years. The allegedly perjurious answers, Sweig claims, were traps set up by the prosecutor.

We reject these contentions. In the absence of an admission by the defendant, the only way a defendant's knowledge of the falsity of his statements can be proved is through circumstantial evidence. *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 411 (1950). The jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know. See *United States* v. *Rao,* 394 F.2d 354, 356-57 (2d Cir.), cert. denied, 393 U.S. 845, reh. denied, 393 U.S. 972 (1968); *United States* v. *Jones,* 374 F.2d 414, 419 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *United States* v. *Bergman,* 354 F.2d 931, 934 (2d Cir. 1966); *United States* v. *Marchisio,* 344 F.2d 653, 667 (2d Cir. 1965).[1]

In this case, there was sufficient evidence for the jury to infer that Sweig really remembered Roth, when he said he didn't, and that he remembered making calls within the

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[1] See also *Gebhard* v. *United States,* 422 F.2d 281, 287-88 (9th Cir. 1970); *La Placa* v. *United States, supra,* at 58-59; *United States* v. *Nicoletti,* 310 F.2d 359, 364 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963); *United States* v. *Beach,* 296 F.2d 153, 155 (4th Cir. 1961); and *United States* v. *Magin, supra,* at 77-78.

last three or five years, when he said he didn't. The evidence showed that Sweig had at least nine separate conversations, spanning a four-month period, with five army officers concerning Roth, and that he handled at least eleven different documents concerning Roth. Some of these conversations and documents indicated Sweig's considerable familiarity with the situation. In addition, just five months prior to testifying, Sweig handled a similar matter concerning Warner; and his comments on that matter at the time indicate that he had a great deal of information about the soldier in question. Moreover, the government showed Sweig's motive to lie, since he was intimely connected with Voloshen's activities in both of these matters—activities which at the time he testified he knew were being investigated. All this was surely enough for the jury to find beyond a reasonable doubt that Sweig wilfully lied when he made the statements charged as perjurious.

Sweig's argument that his statements before the grand jury, viewed as a whole, amounted to an admission, rather than a denial, that he made calls for Voloshen within the past three or five years is simply erroneous. The transcript of Sweig's testimony before the grand jury, quoted above, quite clearly shows the opposite.

Sweig's next contention is that the trial court erred in joining the conspiracy count with the perjury counts under Rule 8 of the Federal Rules of Criminal Procedure;[2] and

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[2] Rule 8 provides:

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are al-

that even if joinder was permitted, the court abused its discretion in denying Sweig's motion for a severance under Rule 14.[3] The basis for this argument is that certain evidence, including various "hearsay" declarations, which were admissible on the conspiracy count as statements made in furtherance of the conspiracy, were not related in any way to the perjury counts; and since the counts were joined, the evidence may have spilled over in the jury's mind to the perjury allegations, on which it would not have been admissible, and thereby prejudiced Sweig.

The government opposed Sweig's motion for a severance because "proof of the perjury is admissible as false exculpatory statements vis-a-vis the conspiracy and proof of the conspiracy is admissible to show motive and wilfulness with respect to the perjury." Judge Frankel denied the motion on this ground—i.e., that the conspiracy and perjury counts required substantially the same proof.

We agree with the district court's disposition. Sweig's claim for a severance "as of right" under Rule 8 fails because Rule 8(a) permits the joinder of two or more offenses against a single defendant if the offenses are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." We believe that Sweig's acts constituting the basis for the conspiracy charges and those constituting the basis

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leged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[3] Rule 14 provides in pertinent part:

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

for the perjury charges were so connected. Virtually every overt act alleged in the conspiracy count formed the subject matter of one of the eight perjury counts, and would therefore be admissible in a perjury trial to show the falsity of Sweig's denials before the grand jury. Given such a clear case of commonality of proof, the conspiracy and perjury offenses were surely "connected together" for purposes of Rule 8(a). *United States* v. *Baker,* 401 F.2d 958, 971 (D.C. Cir. 1968); cf. *United States* v. *Kelley,* 105 F.2d 912, 916 (2d Cir. 1939).

Sweig's pretrial motion for discretionary severance under Rule 14, like his claim of misjoinder under Rule 8(a), was based on the simple proposition that conspiracy and perjury were distinct offenses that should not be tried together. In denying the motion, Judge Frankel noted, "It remains possible, of course, that different things or a different light may appear as the case advances toward or through the trial stage. Accordingly, the denial now of the application for a severance is without prejudice to a renewed application in changed circumstances." Despite this expression of the court's willingness to reconsider the question of severance, the defense never raised the issue again. Judge Frankel was therefore never asked to balance the possible prejudice resulting from the admission of the tangential "hearsay" declarations against the relevance of Sweig's participation in a conspiracy to his motive to lie before the grand jury. Hence, in the absence of plain error, this claim is not available on appeal. Rule 30, Fed. R. Crim. P. In the circumstances of this case, we cannot say that denial of the severance motion constituted plain error.[4]

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[4] For similar reasons we must reject Sweig's claim that it was plain error not to instruct the jury that the "hearsay" declarations were admissible only as to the conspiracy count. Sweig made no request for such an instruction nor did he object to the charge given. Judge Frankel did specifically instruct the jury in his final

Sweig's next contention is that the trial court erred in admitting into evidence without limitation his sworn testimony before the Securities Exchange Commission. On October 14, 1969—the day before his grand jury appearance—Sweig testified falsely before the S.E.C. about his dealings with Voloshen; and a record of that testimony was admitted at trial. Judge Frankel was clearly correct in admitting this testimony, for the propriety of receiving prior false statements to negative a defense of mistake or good faith in a perjury prosecution is beyond doubt. II Wigmore, Evidence (3rd ed.) §342, p. 246 (1940); *Williamson* v. *United States,* 207 U.S. 425, 449-451 (1908). See also *United States* v. *Deaton,* 381 F.2d 114, 117 (2d Cir. 1967), and the cases cited therein; *United States* v. *Bradwell,* 388 F.2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968); *United States* v. *Light,* 394 F.2d 908, 912-13 (2d Cir. 1968). Here, evidence of Sweig's false statement to the S.E.C. concerning Voloshen only the day before his grand jury appearance was certainly relevant to the issue of the wilfulness of statements to the grand jury concerning Roth and Warner, regardless of the fact that the subject matter was not identical in all respects.[5]

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remarks that it must view the counts in the indictment as "seven separate and distinct charges or alleged crimes," and that to reach a verdict it had to make "seven distinct and separate determinations on each one of the [counts]." In addition, the court explicitly stated that with respect to the Roth perjury count, the jury could not convict unless "the falsity in fact has been proven to your satisfaction beyond a reasonable doubt."

[5] The parties differ as to the status of the S.E.C. testimony, which was admitted in evidence after the defense had rested. Sweig argues that it was rebuttal evidence and as such inadmissible to rebut the evidence presented by the defense's character witnesses, since only testimony of defendant's bad reputation may be admitted to rebut evidence of defendant's good reputation. The government, however, argues that Judge Frankel admitted the S.E.C. testimony not as rebuttal evidence, but as part of the government's case-in-chief, and that as such it was admissible as relevant to Sweig's knowledge of the falsity of his statements before the grand jury.

Sweig argues, too, that Counts Four through Twelve should have been dismissed because of abuse of the grand jury's power in obtaining the perjury indictment. According to Sweig, the government stipulated after trial that at the time he appeared before the grand jury, the grand jury already had sufficient facts to return an indictment

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The record supports the government's contention. Throughout the trial, Sweig's counsel stated repeatedly that he intended to put the defendant on the stand. At the last minute, however, plans were changed and Sweig did not testify. At that point, the government advised the court that it had been taken by surprise and that it wanted an opportunity to reopen its case in the light of defendant's change in position. One of the items of additional proof it wanted to introduce was Sweig's testimony before the S.E.C. The government stated that if this matter could not be received as rebuttal evidence, then it moved to reopen its case-in-chief so that these additional items of evidence could be considered by the jury. The court specifically asked the government why it had not introduced the S.E.C. testimony during its main case, and the government explained it had anticipated using the testimony in connection with the cross-examination of the defendant when he took the witness stand.

The court then admitted the evidence stating:

> "I am not sure that this all qualifies as rebuttal properly understood but I think the way to handle it is this and I will handle it this way: I will allow the government, considering all the circumstances that have brought us to this situation, to put on these three items of evidence and I think the record could show that I am making this judgment without a close study of the question whether this ought to be viewed as a reopening of the record or rebuttal, because I don't think it makes the least bit of difference to the jury and I think in the end it ought not to make a great deal of difference to us.
>
> "I think the main concern in allowing this is to avoid any prejudice to the defendant. I think the way to handle that is not to exclude evidence, assuming it is otherwise competent, which may help the jury figure out the truth, but to make sure that the defendant has any necessary opportunity to adjust his strategy to this development and to meet it in any suitable way.
>
> "So if that requires some additional time or any other adjustment, we will plan to accommodate that."

The trial court's disposition of this matter was entirely proper; as stated in the text, the S.E.C. testimony seen as part of the government's case-in-chief, was certainly admissible as relevant to the issue of Sweig's wilfulness and to his defense of mistake.

on the conspiracy issue, and hence it was improper to call him before the grand jury. The only reason for so calling him, Sweig contends, was to entrap him into committing perjury.

Sweig, however, misinterprets the government's stipulation. In preparation for his pos-trial motions, Sweig had moved for a reexamination of the voluminous grand jury material (the "section 3500" material) that had been made available during the trial so that he could develop a basis for arguing that there was sufficient evidence to return an indictment at the time he appeared before the grand jury. In order to accommodate the defense and to avoid the extensive work for all concerned that would have been involved in such an inspection, the government offered to stipulate as to the general nature of the information available to the government at the time of Sweig's grand jury appearance. This stipulation conceded only that there was a basis "for arguing" that there was sufficient factual grounds for the return of a conspiracy indictment at the time of Sweig's appearance. It in no sense conceded that the case had been sufficiently developed at that point to ensure the return of such an indictment. Indeed, the fact that almost three months of grand jury investigation took place between the time of Sweig's appearance and the actual filing of the indictment is persuasive evidence that the government had by no means fully developed its case at the time Sweig testified.[6] Sweig's contention that the real

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[6]See *United States* v. *Corallo*, 413 F.2d 1306, 1328 (2d Cir.), cert. denied, 396 U.S. 958 (1969). In the post-trial argument, the government delineated the limited extent of its concession:

> "Now, your Honor, with respect to this stipulation that may have loomed larger in the argument than it was intended, you may recall that informally, in chambers the other day, to avoid an unnecessary burdening of this record with extensive arguments about the 3500 material, we were prepared to stipulate that it was an argument that could be made that 23

purpose for calling him before the grand jury was to produce a perjury record is pure speculation, unfounded in the facts.

In any event, we find no support for a *per se* rule that the grand jury must cease its investigation and desist from calling a possible defendant when it has adduced enough evidence to secure an indictment of that person. It may well develop upon further investigation that others are involved or that those first suspected have explanations or proof which absolve them. Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry. See *United States* v. *Corallo*, 413 F.2d 1306, 1328 (2d Cir.), cert. denied, 396 U.S. 958 (1969); *United States* v. *Winter*, 348 F.2d 204, 207-08 (2d Cir.), cert. denied, 382 U.S. 955 (1965). Indeed, in an investigation such as the grand jury was conducting here, the grand jury and the government would have been subject to proper criticism if the grand jury had failed to invite Sweig's attendance as a witness. It is altogether in the public interest that grand juries should inquire with care and thoroughness before they file formal charges against anyone. There is no support in the record before us that Sweig was called before the grand jury simply to harass him or to build the foundation for a perjury prosecution. Sweig was fully advised of his rights. Cf. *United*

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out of the 85 3500 exhibits came into being prior to the time the defendant appeared before the grand jury.

"I would like the record to be perfectly clear that we don't concede for a minute that that was sufficient to return this indictment at that time and indeed, the fact that so many additional witnesses were called thereafter, I think, is ample proof to the contrary.

"I think the real point that should be made is that what was going on here was an investigation into the misuse of the Speaker's office and what the government was doing at this time was calling the man who was probably in the best position of anyone to provide adequate information . . . ."

States v. *Scully,* 255 F.2d 113 (2d Cir.), cert. denied, 350 U.S. 897 (1955). He appeared and testified. His perjury was clearly established. He has no cause for complaint.

Sweig makes several other claims of error which we have examined and find to be wholly without merit.[7]

Affirmed.

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[7] One such contention is that the indictment should have been dismissed because the grand jury received testimony from Speaker McCormack in an unlawful way: Instead of calling McCormack to testify in person, the grand jury sent three Assistant United States Attorneys to interview him on two occasions, once in the presence of his nephew, and then used the transcript of those interviews in returning the indictment. There are very few persons for whom it would have been more difficult and inconvenient to appear before the grand jury in person than the Speaker of the House of Representatives, and hence it was clearly permissible for the grand jury to use the transcript of interviews with him in returning the indictment. *United States* v. *Umans,* 368 F.2d 725, 730 (2d Cir. 1966), cert. granted, 386 U.S. 940, cert. dismissed, 389 U.S. 80, reh. denied, 389 U.S. 1025 (1967). See also *United States* v. *Leibowitz,* 420 F.2d 39, 41-42 (2d Cir. 1969), and the cases cited therein.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April one thousand nine hundred and seventy-one.
Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
MARTIN SWEIG, NATHAN VOLOSHEN,
DEFENDANTS,
MARTIN SWEIG,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

(s) A. DANIEL FUSARO
Clerk

APPENDIX B

FED. R. CRIM. P.

RULE 6. THE GRAND JURY

. . .

(*d*) *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

RULE 6

(*e*) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and so person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS

(*a*) *Joinder of Offenses.* Two or more offenses may be

charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(*b*) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 14. RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966.

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
As amended Feb. 28, 1966, eff. July 1, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1702

MARTIN SWEIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with co-defendant Voloshen, petitioner (a former administrative assistant to the then Speaker of the House of Representatives, John W. McCormack) was convicted of one count of perjury before a federal grand jury, in violation of 18 U.S.C. 1621. He was sentenced to thirty months in jail and a $2000 fine. The court of appeals affirmed (Pet. 40-52).

None of the issues petitioner raises is of general significance and each was thoroughly canvassed and

properly decided by the court below. For the reasons set forth in its opinion, we respectfully submit that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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